

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SANDRA K. KRAUSE,

Plaintiff,

vs.

NEVADA MUTUAL INSURANCE CO., *et al.*,

Defendants.

Case No. 2:12-cv-00342-JCM-CWH

ORDER

This matter is before the Court on Defendants' Motion to Seal Motion for Emergency Protective Order (#82), filed May 28, 2013; Defendants' Motion to Seal Exhibit to Motion for Sanctions (#100), filed June 14, 2013; and Plaintiff's Motion to Seal Reply in Support of Motion for Sanctions (#118), filed July 1, 2013.

The primary authority cited to support these requests to seal is the existing protective order. *See* #47. As the Court previously noted, the existing protective order was specifically entered to facilitate discovery. It is not a blanket order permitting the sealing of discovery documents for all purposes. Nor could it be based on substantial Ninth Circuit case law to the contrary. The Ninth Circuit examined the presumption of public access to judicial files and records in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) and held that parties seeking to maintain the secrecy of documents attached to dispositive motions must show compelling reasons sufficient to overcome the presumption of public access. *Id.* at 1180.

Rule 26(c) permits the court in which an action is pending to "make any order which justice requires to protect the party or person from annoyance, embarrassment, oppression or undue burden or expense" upon motion by a party or a person from whom discovery is sought. The burden of persuasion under Fed. R. Civ. P. 26(c) is on the party seeking the protective order. *Cipollone v.*

1 *Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). To meet that burden of persuasion, the
2 party seeking the protective order must show good cause by demonstrating a particular need for the
3 protection sought. *Beckman Indus., Inc., v. Int'l. Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Rule
4 26(c) requires more than “broad allegations of harm, unsubstantiated by specific examples or
5 articulated reasoning.” *Id.*, citing *Cipollone v. Liggett*. “A party asserting good cause bears the
6 burden, for each particular document it seeks to protect, of showing that prejudice or harm will
7 result if no protective order is granted.” *Foltz v. State Farm*, 331 F.3d 1122, 1130 (9th Cir. 2003),
8 citing *San Jose Mercury News, Inc., v. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999).

9 In *Seattle Times Co. v. Rhinehart*, the Supreme Court interpreted the language of Fed. R.
10 Civ. P. 26(c) conferring “broad discretion on the trial court to decide when a protective order is
11 appropriate and what degree of protection is required.” 467 U.S. 20, 36 (1984). The Supreme Court
12 acknowledged that the “trial court is in the best position to weigh fairly the competing needs and
13 interests of the parties affected by discovery. The unique character of the discovery process requires
14 that the trial court have substantial latitude to fashion protective orders.” *Id.* Although the trial
15 court has broad discretion in fashioning protective orders, the Supreme Court has also recognized “a
16 general right to inspect and copy public records and documents, including judicial records and
17 documents.” *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). However, the common
18 law right to inspect and copy judicial records is not absolute. *Id.* Thus, the Supreme Court
19 concluded, “[e]very court has supervisory power of its own records and files, and access has been
20 denied where the court files might have become a vehicle for improper purposes.” *Id.*

21 Generally, unless court records are of the type “traditionally kept secret” the Ninth Circuit
22 recognizes a “strong presumption in favor of access.” *Foltz v. State Farm Mutual Auto Insurance*
23 *Company*, 331 F.3d 1122, 1135 (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)).
24 Although the federal common law right of access exists, it “does not mandate disclosure in all
25 cases.” *San Jose Mercury News, Inc.*, 187 F.3d at 1102. The strong presumption in favor of public
26 access recognized by the Ninth Circuit “can be overcome by sufficiently important countervailing
27 interests.” *Id.* In the Ninth Circuit, “[i]t is well-established that the fruits of pretrial discovery are,
28 in the absence of a court order to the contrary, presumptively public.” *San Jose Mercury News v.*

1 *United States District Court*, 187 F.3d 1096, 1103 (9th Cir. 1999). Thus, the Ninth Circuit has
2 concluded, “[g]enerally, the public can gain access to litigation documents and information
3 produced during discovery unless the party opposing disclosure shows ‘good cause’ why a
4 protective order is necessary.” *Phillips v. General Motors*, 307 F.3d 1206, 1210 (9th Cir. 2002).
5 “For good cause to exist, the party seeking protection bears the burden of showing specific prejudice
6 or harm will result if no protective order is granted.” *Id.* at 1210-11. Or, as the Ninth Circuit
7 articulated the standard in *Foltz*, “[t]he burden is on the party requesting a protective order to
8 demonstrate that (1) the material in question is a trade secret or other confidential information
9 within the scope of Rule 26(c) and (2) disclosure would cause an identifiable, significant harm.”
10 *Foltz* at 1131, quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987). “If a court
11 finds particularized harm will result from disclosure of information to the public, then it balances
12 the public and private interests to decide whether a protective order is necessary.” *Id.* at 1211
13 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

14 In *Phillips*, the Ninth Circuit carved out an exception to the presumption of public access,
15 holding that the presumption does not apply to materials filed with the court under seal subject to a
16 valid protective order. 307 F.3d at 1213. The *Phillips* decision relied on the *Seattle Times* decision
17 in concluding that protective orders restricting disclosure of discovery materials which are not
18 admitted in evidence do not violate the public right of access to traditionally public sources of
19 information. *Id.* at 1213 (quoting, *Seattle Times*, 467 U.S. at 33). The Ninth Circuit reasoned that
20 the presumption of public access was rebutted because a district court had already determined that
21 good cause existed to protect the information from public disclosure by balancing the need for
22 discovery against the need for confidentiality in issuing the protective order. *Id.* Therefore, “when a
23 party attaches a sealed discovery document to a non-dispositive motion, the usual presumption of
24 the public’s right of access is rebutted.”

25 The Ninth Circuit recently and comprehensively examined the presumption of public
26 access to judicial files and records in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172
27 (9th Cir. 2006). There, the court recognized that different interests are at stake in preserving the
28 secrecy of materials produced during discovery and materials attached to dispositive motions.

1 Citing *Phillips* and *Foltz*, the *Kamakana* decision reiterated that a protective order issued under the
2 Rule 26(c) may be issued once a particularized showing of good cause exists for preserving the
3 secrecy of discovery materials. “Rule 26(c) gives the district court much flexibility in balancing and
4 protecting the interests of private parties.” 447 F.3d at 1180. The *Kamakana* court, therefore, held
5 that a “good cause” showing is sufficient to seal documents produced in discovery. *Id.* However,
6 the *Kamakana* decision also held that a showing of “compelling reasons” is needed to support the
7 secrecy of documents attached to dispositive motions. A showing of “good cause” does not,
8 without more, satisfy the “compelling reasons” test required to maintain the secrecy of documents
9 attached to dispositive motions. *Id.* The court found that:

10 Different interests are at stake with the right of access than with
11 Rule 26(c); with the former, the private interests of the litigants are
12 not the only weights on the scale. Unlike private materials unearthed
13 during discovery, judicial records are public documents almost by
14 definition, and the public is entitled to access by default. (Citation
15 omitted). This fact sharply tips the balance in favor of production
when a document formally sealed for good cause under Rule 26(c)
becomes part of the judicial record. Thus, a “good cause” showing
alone will not suffice to fulfill the “compelling reasons” standard that
a party must meet to rebut the presumption of access to dispositive
pleadings and attachments.

16 *Id.*

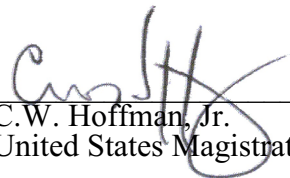
17 *Kamakana* recognized that “compelling reasons” sufficient to outweigh the public’s interests
18 in disclosure and justify sealing records exist when court records may be used to gratify private
19 spite, permit public scandal, circulate libelous statements, or release trade secrets. *Id.* at 1179
20 (internal quotations omitted). However, “[t]he mere fact that the production of records may lead to
21 a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more,
22 compel the court to seal its records.” *Id.*, citing, *Foltz*, 331 F.3d at 1136. To justify sealing
23 documents attached to dispositive motions, a party is required to present articulable facts identifying
24 the interests favoring continuing secrecy *and* show that these specific interests overcome the
25 presumption of public access by outweighing the public’s interests in understanding the judicial
26 process. *Id.* at 1181 (internal citations and quotations omitted).

27 Based on the foregoing and good cause appearing therefore, the Court will grant motions to
28 seal (#82), (#100), and (#118). There is an existing protective order in this matter and the motions

1 and exhibits associated with these specific motions to seal are not dispositive. This order is limited
2 to these particular motions and does not affect any other motion or filing other than the specific
3 motions at issue. The Court may, at any time, revisit this order depending on its determination of
4 several pending motions to seal in this case and its apparent companion case found at 2:13-cv-
5 00976-APG-CWH.

6 **IT IS HEREBY ORDERED** that Defendants' Motion to Seal Motion for Emergency
7 Protective Order (#82); Defendants' Motion to Seal Exhibit to Motion for Sanctions (#100); and
8 Plaintiff's Motion to Seal Reply in Support of Motion for Sanctions (#118) are **granted**.

9 DATED: July 15, 2013.

10
11 
12 C.W. Hoffman, Jr.
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28